



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 19, 1996

Ms. Brenda F. Arnett  
Executive Director  
Texas Department of Commerce  
P.O. Box 12728  
Austin, Texas 78711-2728

Letter Opinion No. 96-146

Re: Whether the Capital Certified Development  
Corporation is subject to the Texas Open  
Meetings Act (ID# 38887)

Dear Ms. Arnett:

You ask whether the meetings of the Capital Certified Development Corporation (the "CCDC") are subject to the Texas Open Meetings Act (the "act"), chapter 551, Government Code. The Department of Commerce created the CCDC pursuant to section 481.077(a) of the Government Code, which provides as follows:

The department may create a statewide certified development corporation to carry out the purposes of the Small Business Investment Act of 1958 (15 U.S.C. Section 697). The corporation has the rights and powers of a nonprofit corporation incorporated under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes), except to the extent inconsistent with this section. The corporation may contract with the department, counsel, and other advisors its board of directors considers necessary.<sup>1</sup>

Section 481.077(b) of the Government Code, which deals with the revenues and funds of the corporation, provides as follows:

The revenues and funds of the corporation shall be deposited with one or more financial institutions chosen for that purpose by the board of directors of the corporation. Expenses incurred by the corporation in the operation and administration of its programs and affairs, including expenditures for professional, management, and legal services, shall be paid out of the fees collected or revenues generated under this chapter. The corporation shall enter into a written agreement with the department for the provision of professional and management services.

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<sup>1</sup>Gov't Code § 481.077(a).

You state that the CCDC "has been chartered by the U.S. Small Business Administration ("SBA") to foster small businesses through the packaging of SBA Section 504 program loans." Section 481.077(a) of the Government Code, which authorizes the creation of the CCDC, requires the corporation created under that section to carry out the purposes of the Small Business Investment Act of 1958, 15 U.S.C § 697. The overall purpose of this statute is to "foster economic development and to create or preserve job opportunities . . . by providing long-term financing for small business concerns through the development company program authorized by this subchapter."<sup>2</sup> Section 697 of title 15 authorizes the Small Business Administration to guarantee the timely payment of principal and interest on any debenture issued by a qualified state or local development company. A qualified state or local development company is defined by section 697 as follows:

For purposes of this section, the term "qualified State or local development company" means any State or local development company which, as determined by the Administration, has--

- (A) a full-time professional staff;
- (B) professional management ability (including adequate accounting, legal, and business-servicing abilities); and
- (C) a board of directors, or membership, which meets on a regular basis to make management decisions for such company, including decisions relating to the making and servicing of loans by such company.

15 U.S.C. § 697(e)(1).

The department provides the CCDC with staff, office space, equipment, and supplies under a management contract entered into as authorized by section 481.077. At present, the department is paying the salaries and benefits for staff working on CCDC matters. The contract provides that the CCDC shall reimburse the department for staff costs and other operating expenses when its revenues from fees collected for SBA loan packaging<sup>3</sup> enable it to maintain an operating fund balance sufficient to cover six months of operating expenses.

The statute dictates neither the membership nor the leadership of the corporation, and you inform us that neither you nor the policy board that governs the department appoints the CCDC board members. Officers and directors are appointed pursuant to the articles of incorporation and

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<sup>2</sup>15 U.S.C. § 695(a).

<sup>3</sup>See *id.* § 697; 13 C.F.R. §§ 108.503-6(a), .504(c).

bylaws prepared in compliance with article 1396-1.01, V.T.C.S.<sup>4</sup> Actions taken by the CCDC board are not appealable to the department.

With this background in mind, we turn to your question. You state that the CCDC has held its board meetings in compliance with the Open Meetings Act since its inception, but its board members, who reside in different areas of the state, could meet less expensively, often by telephone, if the board is not subject to the act. The Open Meetings Act applies to a list of "governmental bodies" defined in section 551.001(3) of the Government Code. Subsections (B) through (H) of section 551.001(3) refer to local governmental bodies of various kinds, while the CCDC was created by a state agency as a "statewide certified development corporation," Gov't Code § 481.077, and is not a local level entity of any sort. Accordingly, it is not a governing body as defined by subsections (B) through (H) of section 551.001(3). Nor is it a nonprofit water supply corporation organized pursuant to article 1434a, V.T.C.S., defined as a governmental body by subsection (I).<sup>5</sup> The definition of a governmental body also includes "a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members . . . ."<sup>6</sup>

While the CCDC is clearly not in the legislative branch of the state, it does have some associations with the Department of Commerce, an entity in the executive branch of state government. Because of these associations, we must address the above definition of "governmental body" in some depth.

This office has applied the following criteria to determine that an entity is a governmental body within section 551.001(3)(A) of the Government Code: "The body must be an entity within the executive or legislative department of the state; The entity must be under the control of one or more elected or appointed members; The entity must have supervision or control over . . . public business or policy."<sup>7</sup>

In *Gulf Regional Education Television Affiliates v. University of Houston*, 746 S.W.2d 803 (Tex. App.--Houston [14th Dist.] 1988, writ denied), the court applied this test to an educational broadcasting association operated at the University of Houston. Gulf Regional Education Television Affiliates ("GRETA"), a group of school districts and parochial schools, provided educational

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<sup>4</sup>The initial board of directors is designated in the articles of incorporation filed by the incorporators with the secretary of state's office. V.T.C.S. arts. 1396-3.01, -3.02(9).

<sup>5</sup>See generally V.T.C.S. art. 1434a; Attorney General Opinion JM-596 (1986).

<sup>6</sup>Gov't Code § 551.001(3)(A).

<sup>7</sup>Attorney General Opinion H-772 listed five criteria for determining whether a meeting of state-level entity is subject to the Open Meetings Act. We have not listed the two criteria that are directed to determining whether a particular meeting is subject to the Open Meetings Act. See Attorney General Opinions DM-284 (1994), H-772 (1976).

television programs in conjunction with the public television station at the University of Houston.<sup>8</sup> The members elected a board of directors, whose function it was to advise the station of the members' wishes regarding programming.<sup>9</sup> The university established GRETA as an auxiliary enterprise of the University of Houston, hired its director, and collected money from the members through GRETA. The funds were deposited in a university account and audited by university auditors.<sup>10</sup>

All parties agreed that GRETA was an auxiliary enterprise of the University of Houston, but disagreed about the meaning of that relationship. The court gave the following summary of evidence on the nature of an auxiliary enterprise: "While the University apparently allows its auxiliary enterprises to exercise varying degrees of autonomy, it retains ultimate responsibility for and control over those enterprises. . . ."<sup>11</sup>

The court referred to a letter from a university official to the GRETA board that discussed the nature of auxiliary enterprises, stating that they are "outside the normal structure of colleges, divisions, departments and schools of the university, but are part of the university 'family.'"<sup>12</sup> It noted that auxiliary enterprise employees were employees of the university, that the legislature placed control of auxiliary enterprise funds in the universities, and "[f]inally, and most importantly," that "while auxiliary enterprises can enter directly into contracts, the University recognizes that, particularly in the case of major contracts, the contracting parties ultimately hold the University legally responsible."<sup>13</sup> The court concluded that as an auxiliary enterprise, GRETA was part of the university and therefore subject to governance by the University Board of Regents.<sup>14</sup> Thus, it was within the executive branch of the state.<sup>15</sup> Since GRETA's board of directors were appointed by the member schools, it was under the control of one or more elected or appointed members, and it

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<sup>8</sup>*Gulf Regional Educ. Television Affiliates v. University of Houston*, 746 S.W.2d 803, 804 (Tex. App.--Houston [14th Dist.] 1988, writ denied).

<sup>9</sup>*Id.* at 805.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 808.

<sup>12</sup>*Id.* at 807.

<sup>13</sup>*Id.* at 808.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 809.

operated educational programming with little control from the university.<sup>16</sup> Accordingly, the GRETA board was a state-level governmental body subject to the Open Meetings Act.

The CCDC is not controlled by or accountable to the department's policy board, nor is there any indication that the department may be held responsible for the CCDC's liabilities. The CCDC board of directors is authorized to choose the depository for its revenues and funds. Although the department provides facilities and employees to the CCDC, this is done pursuant to a management contract with the CCDC board and not in the exercise of supervision and control over the CCDC. The CCDC, unlike GRETA, operates independently of the department. It is not controlled by or accountable to an entity in the executive branch of state government. We conclude that the CCDC is not an entity within the executive branch of state government and therefore is not a governmental body within section 551.001(3)(A) of the Open Meetings Act.<sup>17</sup> Accordingly, we conclude that the Open Meetings Act does not require the board of directors of the CCDC to comply with its procedures for meetings.

The CCDC must of course comply with the provisions of its articles of incorporation and bylaws.<sup>18</sup> If the articles of incorporation or the bylaws provide that the board of directors must meet in compliance with the Open Meetings Act, the board must do so.<sup>19</sup> "Subject to the provisions required or permitted by . . . [the Non-Profit Corporation Act] for notice of meetings, unless otherwise restricted by the articles of incorporation or bylaws," the board of directors of a nonprofit corporation may meet by means of conference telephone call pursuant to article 1396-9.11, V.T.C.S.<sup>20</sup>

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<sup>16</sup>*Id.*

<sup>17</sup>Since we have determined that the CCDC is not an entity within the executive branch of state government, we need not consider whether it is under the control of one or more elected or appointed members, or whether it has supervision or control over public business or policy. We note, however, that the directors of a nonprofit corporation "shall be elected, appointed, or designated in the manner and for the terms provided in the articles of incorporation or the by-laws." V.T.C.S. art. 1396-2.15. Although the persons who govern the CCDC may be elected or appointed, they are elected or appointed by private persons, and not by public officers or governmental entities.

<sup>18</sup>V.T.C.S. art. 1396-2.09 (bylaws may contain any provisions for the regulation of corporation not inconsistent with law or articles of incorporation).

<sup>19</sup>Article 1396-2.09, V.T.C.S., provides for amending the bylaws of a nonprofit corporation.

<sup>20</sup>Article 1396-9.11, V.T.C.S., permits meetings of members of a board of directors of a corporation to confer by conference telephone "by means of which all persons participating in the meeting can hear each other."

**S U M M A R Y**

The Capital Certified Development Corporation (the "CCDC"), created as a nonprofit corporation by the Department of Commerce pursuant to section 481.077(a) of the Government Code, is not a local level entity, nor is it an entity in the legislative or executive branch of state government. Accordingly, the CCDC is not required by the terms of the Texas Open Meetings Act, chapter 551, Texas Government Code, to comply with its procedures for meetings. If the CCDC's articles of incorporation or the bylaws provide that the board of directors must meet in compliance with the Open Meetings Act, the board must do so.

Yours very truly,

A handwritten signature in cursive script that reads "Susan Garrison".

Susan Garrison  
Assistant Attorney General  
Opinion Committee